

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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: RANI SHEHNAZ, :  
: Petitioner, :  
: 04 Civ. 2578 (DLC) :  
: -v- :  
: :  
: JOHN ASHCROFT, as Attorney General Of :  
: the United States, et al., : OPINION & ORDER  
: Respondents. :  
: :  
: :  
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Appearances:

For Petitioner:  
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For Respondents:  
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DENISE COTE, District Judge:

Petitioner Rani Shehnaz ("Shehnaz") has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. She challenges her detention by United States Immigration and Customs Enforcement ("ICE"). Because the United States District Court in New Jersey is the only court with jurisdiction to review Shenaz's custody challenge, this action is transferred to the District of New Jersey. Shehnaz's separate challenge to an order of removal, which is sub judice before the United States Court of Appeals for the Second Circuit, is not the subject of this petition.

### Factual Background

Shehnaz is a fifty-four year old native of Pakistan who arrived illegally in the United States in 1988 or 1989 and has lived here since that time. Shehnaz alleges that she fled Pakistan with two of her four children because her husband abused both her and her children, and because she was persecuted for her participation in the Pakistani People's Party. Her husband, angry at the disgrace she had caused him and his family by fleeing, had a death edict issued against her.

From the time she first came to the United States and until her arrest in October 2003, Shehnaz lived with her unmarried brother. By 1991, she was reunited with all of her children. Shehnaz purchased a home in Queens, which has been sold since her arrest, and the family lived there for some years. According to affidavits offered in support of her petition, Shehnaz's brother was abusive toward her and her children.

Shehnaz applied for asylum in 1991. Shehnaz's brother was arrested in early 2004, and is currently serving a federal sentence for credit card fraud. Shehnaz and her children contend that they were largely unaware of the status of their immigration cases prior to his arrest because Shenaz's brother confiscated their mail. Shehnaz indicates that, at the time of her application for asylum, she was represented by an attorney now disbarred and serving time in a federal prison for defrauding his clients. She asserts that he never told her she needed to appear for a removal hearing on February 20, 1998.

In 1998, Shehnaz married a United States citizen. They were subsequently divorced. Shehnaz has been continuously employed at a grocery store while in the United States. Shehnaz's daughter is now a United States citizen and has three children who are United States citizens by her husband, who is also a United States citizen. Shehnaz has presented affidavits from each of her children and from four long-term friends who are willing to sign bail bonds.

In October of 2003, federal agents came to Shehnaz's home to arrest her brother. They discovered that there was an outstanding final order of removal against Shehnaz and arrested her. Shehnaz has been incarcerated since then at the Elizabeth Detention Center in Elizabeth, New Jersey. She asserts that her health has significantly deteriorated during the months of her detention.

#### Procedural Background

As noted, Shehnaz applied for asylum on in 1991. On October 21, 1997, she met with an asylum officer who referred the case to an immigration judge. On October 31, 1997, the Immigration and Naturalization Service ("INS") filed a Notice to Appear, ordering Shehnaz to appear for a hearing on February 20, 1998. The hearing proceeded without Shehnaz, and the Immigration Judge ordered her removed in absentia. On May 14, 1998, Shehnaz filed a motion to reopen the removal proceedings based on the ineffective assistance of her first attorney in not advising her

to appear at the February hearing. The Immigration Judge denied that motion on the grounds that no new evidence was presented and that there was insufficient evidence of ineffective assistance of counsel. Shehnaz then appealed the removal decision to the Board of Immigration Appeals ("BIA"), which dismissed the appeal on September 12, 2000, on the grounds that there were no exceptional circumstances to warrant reopening the case. Shehnaz filed a motion to reconsider with the BIA, and the BIA denied that motion on June 18, 2001. In October 2003, shortly after her arrest, Shehnaz filed a second motion to reopen the removal proceeding before the BIA. The BIA denied that motion on February 26, 2004.

On October 17, 2003, Shehnaz filed an untimely petition to review and a motion to stay her removal with the Court of Appeals for the Second Circuit.<sup>1</sup> Pursuant to a "forbearance policy," the United States Attorney's Office stayed her removal pending the outcome of the Second Circuit case. The petition and motion in the Second Circuit were withdrawn with prejudice by stipulation on July 21, 2004. On October 17, 2003, Shehnaz filed a petition for a writ of habeas corpus in the Southern District Court of New York. The Honorable Charles Brieant dismissed the lawsuit on April 29, 2004 without prejudice for failure to prosecute.

On March 23, 2004, Shehnaz filed another motion in the Second Circuit to stay her removal and a petition for review of

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<sup>1</sup> Shehnaz's October 17, 2003 petition for review of the BIA's September 12, 2000 decision was filed three years after the statutory deadline. See 8 U.S.C. § 1252(d)(1)(2000) ("[A] petition for review must be filed not later than 30 days after the date of the final order of removal.").

the BIA's February 26, 2004 denial of her motion to reopen the removal proceedings. The Second Circuit has not yet ruled on her requests, but a stay of her removal is in effect pursuant to the "forbearance policy."

Shehnaz has also petitioned ICE for her temporary release pending the outcome of the removal proceedings. That litigation is the subject of the petition before this Court. On November 24, 2003, Shehnaz filed a request for supervised release with the ICE Field Office Director for New Jersey. On January 16, 2004, ICE sent a letter to Shehnaz informing her that she was not eligible for a custody review under Section 241 of the Immigration and Naturalization Act, as amended ("INA"), 8 U.S.C. § 1231 (post-removal custody), because the stay of her removal made Shehnaz ineligible for a custody review. On or around April 5, she filed a second request for custody review claiming she was being unlawfully detained under Section 236 of the INA, 8 U.S.C. § 1226 (pre-removal custody), which was denied on April 8.

On April 5, Shehnaz also filed the instant petition for a writ of habeas corpus in this Court claiming that she was being unlawfully detained under Section 236. At a hearing on April 9 to address petitioner's order to show cause why a writ of habeas corpus should not be issued, the parties agreed that because Shehnaz's petition claimed a right to release from custody pursuant to Section 236, rather than Section 241, and because Shehnaz had not been given adequate notice that ICE would be conducting a custody review, see 8 C.F.R. § 241.4(h)(2) (thirty-

day notice requirement), Shehnaz could submit further documentation to the ICE Field Office Director for New Jersey in support of her claim for custody release. In addition, the parties agreed that ICE would make a new determination based on the evidence before it and if ICE determined to continue Shehnaz's custody, she could file an amended habeas petition. Pursuant to this understanding, ICE gave formal notice to Shehnaz of a new custody review, and on or about May 21, Shehnaz submitted a request for supervised release to the ICE Field Office Director in New Jersey.

On June 23, ICE denied Shenaz's request for supervised release on the grounds that she has travel papers available, that she is flight risk based on her failure to appear for the removal hearing and the recent sale of her home, and that the only impediment to her removal is the stay she obtained by filing in the Second Circuit. Briefing on this petition was fully submitted on August 13.

### Discussion

The petitioner challenges her detention on two grounds. First, she contends that she qualifies for supervised released. Second, the petitioner alleges that her detention violates her right to due process of law. The Government contends that this Court lacks jurisdiction to adjudicate Shehnaz's petition and, thus, the action should be transferred to the United States District Court in New Jersey, where the petitioner is being

detained. Because the Government's jurisdictional argument has merit, there is no need to address its alternative contention -- that the decision to detain Shehnaz is in the unreviewable discretion of ICE and is otherwise proper, because Shehnaz has tolled the 90-day removal period by filing for a stay of removal in the Second Circuit.

The federal habeas statute provides that a "writ of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions." 28 U.S.C. § 2241(a). The proper respondent to a habeas petition is "the person who has custody over [the petitioner]." 28 U.S.C. § 2242; see also 28 U.S.C. § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained"). The Supreme Court recently reaffirmed that "for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement" and the "proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." Rumsfield v. Padilla, 124 S.Ct. 2711, 2718, 2722 (2004) (collecting cases). In other words, when physical custody is contested a "writ is issuable only in the district of confinement" and against the immediate custodian, not a supervisory official who exercises legal control. Id. at 2722 (citation omitted).

Padilla declined to rule on the question of whether the Attorney General is a proper respondent for a habeas petition

filed by an alien pending deportation. Id. at 2718 n.8. "The lower courts have divided on this question, with the majority applying the immediate custodian rule and holding that the Attorney General is not a proper respondent." Id. (collecting cases).

Following Padilla, courts in this district have found that the Attorney General is a proper respondent in immigration habeas petitions, but only when the habeas petition is a non-core petition, that is, where it challenges the underlying immigration decision, as opposed to the physical custody of the petitioner. For example, in Batista-Taveras v. Ashcroft, No. 03 Civ. 1968 (LAK), 2004 WL 2149095, at \*6 (S.D.N.Y. Sept. 23, 2004), and Garcia-Rivas v. Aschcroft, No. 04 Civ. 292 (NRB), 2004 WL 1534156, at \*2 (S.D.N.Y. July 7, 2004), the Attorney General was found to be a proper respondent in a habeas petition filed by an alien awaiting deportation. The habeas petitions in these two cases, however, contested the deportation orders themselves, not solely the petitioners' detention. In Batista-Taveras, the petitioner contested his removal asserting, among other things, ineffective assistance of counsel throughout his immigration proceedings. Batista-Taveras, 2004 WL 2149095, at \*5. In Garcia-Rivas, the habeas petition challenged the ruling of the immigration judge finding petitioner removable and ineligible for the waiver of removal. Garcia-Rivas, 2004 WL 1534156, at \*1.

Shehnaz's amended petition challenges only her physical confinement in the Elizabeth Detention Facility. She seeks



temporary release pending the outcome of her removal proceedings and her appeal to the Second Circuit. Shehnaz does not contest through this petition any underlying decision pertaining to her potential deportation. This petition, which is analogous to a request for bail, is a core habeas petition. This Court lacks jurisdiction over this habeas petition. It can only be filed in the district of confinement, the District of New Jersey, and against petitioner's immediate custodian, identified in the amended petition as Josephine Easterling, the Warden of the Elizabeth Detention Center.

When a civil action is filed in a district court that lacks jurisdiction, that court "shall, if it is in the interest of justice transfer such action to . . . any other such court in which the action . . . could have been brought at the time it was filed or noticed." 28 U.S.C. § 1631. Courts have consistently found it in the interest of justice to transfer habeas petitions when jurisdiction is lacking. See, e.g., Roman v. Ashcroft, 340 F.3d 314, 329 (6th Cir. 2003); Liriano v. United States, 95 F.3d 119, 122 (2d Cir. 1996).

Conclusion

The Government's request to transfer Rani Shehnaz's amended habeas petition to the District of New Jersey is granted.

SO ORDERED:

Dated: New York, New York  
October 25, 2004

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DENISE COTE  
United States District Judge